

DEC 19 2005

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAUL TIRADO GARCIA,

Defendant - Appellant.

No. 04-16192

D.C. No. CV-02-05562-REC

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior Judge, Presiding

Submitted December 5, 2005^{**}
San Francisco, California

Before: KOZINSKI and McKEOWN, Circuit Judges, and HOGAN^{***}, District
Judge.

^{*} This disposition is not appropriate for publication and may not be cited
to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} This panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Michael R. Hogan, United States District Judge for the
District of Oregon, sitting by designation.

Raul Tirado Garcia appeals from the district court's denial of his § 2255 petition alleging ineffective assistance of counsel and improper sentencing. Garcia pled guilty to four drug-related offenses and entered into a plea agreement that waived the right to appeal or collaterally attack any issue related to his conviction or sentence.

“The sole test of a waiver's validity is whether it was made knowingly and voluntarily.” United States v. Anglin, 215 F.3d 1064, 1068 (9th Cir. 2000). Garcia challenges his waiver on the basis of an alleged Rule 11 violation. However, “even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review.” Bousley v. United States, 523 U.S. 614, 621 (1998). Garcia did not raise his Rule 11 objection on direct review or in his § 2255 petition. This argument is now waived.

Garcia also argues that a waiver is unenforceable with respect to an illegal sentence. Even if Garcia has a claim that survives under Apprendi v. New Jersey, 530 U.S. 466 (2000), his sentence does not violate the rule in that case. See United States v. Toliver, 351 F.3d 423, 432-33 (9th Cir. 2003). Nor does Garcia's sentence violate United States v. Booker, 543 U.S. 220 (2005); recently we joined “every other circuit that has considered the question” in holding that Booker does

not apply to sentences that became final prior to its decision. United States v. Cruz, 423 F.3d 1119, 1120 (9th Cir. 2005) (per curiam).

As Garcia's waiver is enforceable, we lack jurisdiction to hear the balance of his claims.

DISMISSED in part and AFFIRMED in part.